No 357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

MARINE ENGINEERS' BENEFICIAL ASSOCIATION,
LOCAL NO. 33,

Petitioner,

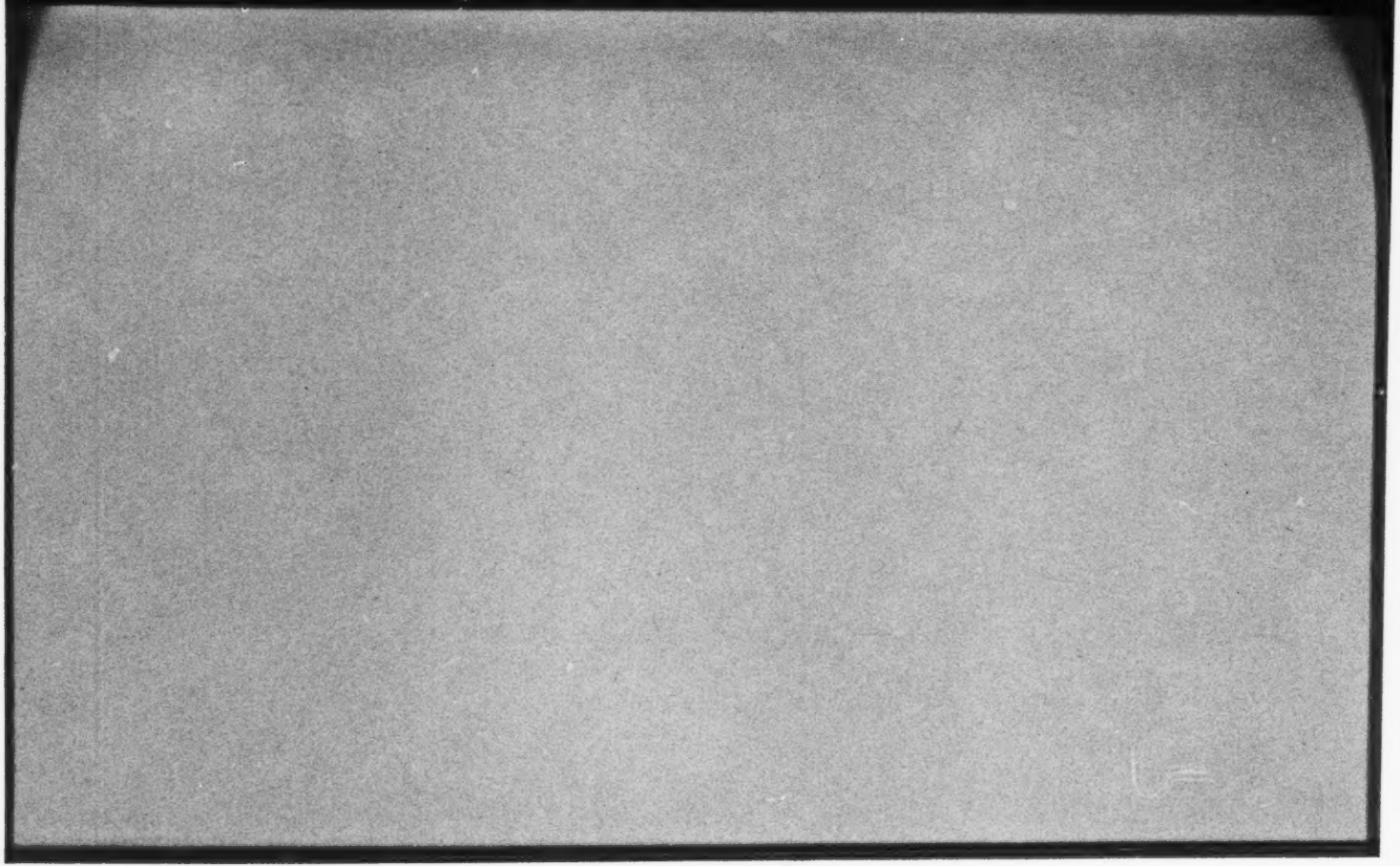
against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

ARTHUR F. DRISCOLL,
Solicitor for Petitioner.



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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Marine Engineers' Beneficial Association, Local No. 33, respectfully represents:

I

Summary Statement of Matter Involved

The petitioner, a labor union, charged an employer with a violation of the National Labor Relations Act and sought redress before the National Labor Relations Board, hereafter referred to as "The Board". After reviewing the facts alleged by the Union and a thorough investigation and although conceding that the facts showed the employer to be guilty of labor practices declared unfair by the National

Labor Relations Act and thus a violation of that Act The Board refused to issue a complaint. Subsequently the Regional Director of The Board did issue a complaint but prior to any hearing on that complaint he again reversed himself and without the consent and over the objection of petitioner issued an official order withdrawing the complaint.

Thereafter The Board refused to issue a complaint.

Petitioner thereupon filed a petition in the Circuit Court of Appeals for the Second Circuit for a review of (a) the order of withdrawal of the complaint, and (b) the refusal of The Board to issue a complaint.

The Circuit Court of Appeals granted a motion by The Board to dismiss the petition as follows:

> "Petition dismissed on the authority of *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, and *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261."

The Board contends that no matter how arbitrary, how vicious or how malicious its refusal to issue a complaint may be, such a refusal cannot be reviewed.

The Board contends that it may refuse to issue a complaint even though it concedes that its investigation substantiates the charges made, and that such charges constitute a violation of the National Labor Relations Act, such a refusal under no circumstances is subject to review.

The Board, conceding that by refusing to issue a complaint *it is barring a petitioner from the only tribunal from which he can seek a remedy,* contends that even though it refuses to issue a complaint and thus deprives petitioner of the rights granted to the petitioner by the National Labor Relations Act, such refusal is nevertheless not subject to review.

The petitioner contends that the refusal of The Board to act upon a matter for which it was specifically created, where its refusal to take jurisdiction is arbitrary or capricious, or malicious, or vicious, is subject to review; that the framers of the National Labor Relations Act contemplated that The Board would weigh the issues arising out of the rights created by the Act with integrity and honesty, and if it found a violation would act thereon, and that failing this The Board's conduct is subject to review. That Section 10(f) (29 U. S. C. A., Sec. 160(g)) was placed in the Act by the Legislators to safeguard that very purpose.

II

Statement of Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935 (28 U. S. C. A., Sec. 347(a)).

III

Question Presented

The question presented is whether The National Labor Relations Board having investigated a complaint duly filed with it, and having found and conceded the existence of a violation of the National Labor Relations Act can arbitrarily or capriciously, or viciously, or maliciously refuse to issue a complaint without having such refusal subject to review.

IV

Statute Involved

The statute involved is the National Labor Relations Act, 29 U. S. C. A., Sections 151-166, commonly known as the Wagner Act, and particularly Section 10-f thereof (29 U. S. C. A., Sec. 160-f; 49 Stat. 449), reading as follows:

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. * * * "

V

Reasons for Granting the Writ

Section 1 of the National Labor Relations Act (29 U. S. C. A., Sec. 151) expresses the purposes of the Act by stating that the refusal by employers to accept the procedure of collective bargaining led to strife and other forms of industrial strikes and unrest. After reciting the harm that resulted therefrom, it states that experience has proved that the protection "by law of the right of employees to organize and bargain collectively safeguards commerce

* * *." It continues by declaring that it is the policy of the United States to eliminate obstructions to the free flow of commerce by protecting the exercise by workers of the designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment. The Act then more specifically defines the rights of workers which it creates, and under Section 3-a (29 U. S. C. A., Sec. 153) specifically establishes The Board to protect and enforce those rights. Its activities and powers are defined in Sections 9, 10 and 11 (29 U. S. C. A., Secs. 160-163).

The matters to which the National Labor Relations Act addressed its concern are those arising out of the relationship of employer and employee. The rights created and the duties created were given exclusively for protection and enforcement to The Board. An employer or an employee aggrieved could seek redress solely in this tribunal. If this tribunal refuses or fails to act, if it fails to protect a right granted, if it fails to enforce a duty created, the beneficiary of the Act is helpless, except to resort to that very violence of strikes, destruction and bloodshed the Act was designed to prevent. It cannot be believed that the Congress of the United States directed its attention to the employer-employee relationship that was causing so much strife and was the subject of so much national concern that it justified a special act of Congress only to have the rights and remedies created by that Act rendered futile and abortive because the tribunal which Congress specifically set up to administer that Act and accomplish its purposes refuses arbitrarily and capriciously so to do.

The question of whether the refusal of The Board to issue a complaint is subject to review by a court is of vital importance to every person who has any interest in the National Labor Relations Act and is of vital national concern. This important question has never been, but should be, decided by the Supreme Court of the United States.

WHEREFORE petitioner prays that a writ of certiorari may issue out of and under the will of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record of all proceedings had herein; and that the order of the United States Circuit Court of Appeals dismissing the petition below be reversed, and that the petitioners may have such other and further relief in the premises as this Court may deem proper.

Dated, September , 1943.

MARINE ENGINEERS' BENEFICIAL ASSOCIATION,
LOCAL NO. 33,

By EDWARD P. TRAINER,
Business Manager,

Petitioner.

ARTHUR F. DRISCOLL,
Solicitor for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

MARINE ENGINEERS' BENEFICIAL ASSOCIATION, LOCAL No. 33,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Jurisdiction

The statement of jurisdiction is set forth in the foregoing petition.

Statement of the Case

The facts are set forth in the foregoing petition and are detailed hereafter. The National Labor Relations Board is described herein as "The Board".

Summary of Argument

POINT I—The refusal of The Board to issue a complaint on facts admittedly showing a violation of the National Labor Relations Act is arbitrary and capricious and is re-

viewable by virtue of Section 10(f) (29 U. S. C. A., Sec. 160(f)) of the National Labor Relations Act.

POINT II—The purpose of the Act supports the view that a refusal to issue a complaint is a final order and reviewable under Section 10(f) (29 U. S. C. A., Sec. 160(f)) of the National Labor Relations Act.

POINT III—The case is one of first impression.

POINT IV—The complaint in the instant case was filed with The Board before the expiration of ninety days after the signing of the agreement between management and labor of which petitioner complains.

POINT I

The refusal of The Board to issue a complaint on facts admittedly showing a violation of the National Labor Relations Act is arbitrary and capricious and is reviewable by virtue of Section 10(f) (29 U. S. C. A., Sec. 160(f)) of the National Labor Relations Act.

The sole section of the National Labor Relations Act that treats of appeal is Section 10(f) (29 U. S. C. A., Sec. 160(f)) which reads:

> "*Any person* aggrieved by a *final order* of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals of the United States * * *" (italics ours) (the rest of the section describes the place of the venue of the appeal and the procedure for taking that appeal).

The petitioner is an aggrieved person within the meaning of that section.

The facts:

The petitioner Labor Union charged an employer with a violation of the National Labor Relations Act and sought

redress before The Board. After reviewing the facts alleged by the Union and after an investigation, and although conceding that the facts showed the employer to be guilty of labor practices declared unfair by the National Labor Relations Act and in violation of it The Board refused to issue a complaint. Subsequently the Regional Director acting for The Board did issue a complaint. But prior to any hearing thereon The Board again reversed itself and without the consent and over the objection of the petitioner issued an official order withdrawing the complaint. The petitioner thereupon appealed to the Circuit Court of Appeals in the Second Circuit.

The Board moved to dismiss the appeal. The Court granted the motion.

The order of The Board withdrawing the complaint, or the refusal of The Board to issue a complaint in either event (1) terminates the proceeding itself, (2) operates to divest from the petitioner the rights granted by the Act, and (3) completely disposes of the subject matter and rights of the parties.

> *Johnson* v. *New York*, 48 Hun 620, 1 N. Y. Supp. 254; Black's Law Dictionary definition of "final order".

The Board has sole and exclusive jurisdiction over the rights and remedies granted by the National Labor Relations Act. Unless The Board takes jurisdiction over the matter and prosecutes it the petitioner is helpless. By such refusal The Board in its dual function as a prosecutor and as a judicial tribunal has closed its doors to petitioner.

> *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261.

Petitioner does not contend that every refusal to issue a complaint by The Board is reviewable. Petitioner does contend that he is entitled to have The Board act honestly and with integrity. Petitioner does contend that if The

Board's failure to act is arbitrary, or capricious, or malicious, or vicious, he must and does have the remedy of appeal.

The Circuit Court of Appeals has seen fit to base its dismissal upon two cases, namely:

> *Federal Trade Commission* v. *Klesner,* 280 U. S. 19;
> *Amalgamated Utility Workers* v. *Consolidated Edison Company* (supra).

Neither is in point.

The *Consolidated Edison* case, supra, was concerned with the National Labor Relations Act, but with an entirely different problem. Section 10(f) was not involved. There The Board had ordered the Consolidated Edison Company of New York to desist from certain labor practices. The Circuit Court of Appeals had granted The Board's petition for enforcement of its order. The Court's decree as modified was affirmed by the Supreme Court of the United States. The petitioner was the Union which sought to have the Circuit Court of Appeals adjudge the employer in contempt for failure to comply with certain requirements of the decree. The Supreme Court of the United States held that the Union had no standing and that the only complainant who could seek an enforcement of the decree was The Board itself. With this your petitioner has no quarrel.

The *Klesner* case, supra, was not concerned with the National Labor Relations Act, but with the Federal Trade Commission Act.

It is respectfully submitted that it is not proper that the construction of an Act other than the National Labor Relations Act should determine the meaning of the latter Act, especially when the language of the other Act and its purposes are entirely dissimilar. The meaning of the National Labor Relations Act and the significance of the terms used therein can be more reasonably gathered from

within the four corners of the Act itself. The National Labor Relations Act differs from the Federal Trade Commission Act and its activities so drastically that to use the Act creating the Trade Commission to determine the meaning of the National Labor Relations Act is almost beyond comprehension.

The National Labor Relations Act is concerned with great social problems affecting the relationship of employer and employee. The social, economic and industrial unrest with which it was to deal was destructive of the very life of the nation. It was concerned with bloodshed and the ruin of property.

The findings and policies of the Act are found in its Section 1 (29 U. S. C. A., Sec. 151). Its purpose was to avoid strikes and other forms of industrial strife and unrest by founding a tribunal of law and order which would protect rights and thus prevent such industrial unrest and prosecute the violators. The tribunal to administer the rights and remedies created by the Act was as important as the Act itself. If the administration of these rights and remedies by a just tribunal failed the Act might as well not have been passed. How much more important, therefore, that the administrative tribunal which supervises the rights and remedies of such vital importance should act with honesty and integrity than the ordinary administrative tribunal. If the administrative tribunal over rights as important as these fails and loses the respect of those over which it is given execlusive jurisdiction, the result is more strikes, more industrial strife, more industrial unrest and perhaps more bloodshed and destruction of property.

It is of the utmost significance, therefore, that every dispute between employer and employee within the knowledge of The Board embracing a violation of the National Labor Relations Act which alleged violation The Board has investigated and found existing should come for prosecution and decision before that Board.

POINT II

The purpose of the Act supports the view that a refusal to issue a complaint is a final order and reviewable under Section 10(f) (29 U. S. C. A., Sec. 160(f)) of the National Labor Relations Act.

The decisions in the *Consolidated Edison* case, supra, and in the *Klesner* case, supra, were dictated by a comparison with the Federal Trade Commission Act. The Federal Trade Commission Act, 15 U. S. C. A., Section 45(b) reads:

> "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, *and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public* * * *." (Italics ours.)

The Commission was created for the interest of the public. It was a regulatory commission to prevent unfair practice in commerce injurious to the public. It had a wide discretion. The Section quoted above specifically reads

> *"if it shall appear to the commission"* (italics ours).

There were no rights created as in the National Labor Relations Act. An individual or aggrieved person if he personally were injured by an unfair action in commerce by a competitor has his redress in the common law courts. The language of that Act is entirely different from the National Labor Relations Act. The Federal Trade Act has no Section comparable to Section 10(f).

The decisions concerned with the Federal Trade Commission have unanimously held that its discretion was not reviewable and that it was required only to prosecute those claims filed with it that it felt should be prosecuted in the public interest.

Interstate Commerce Act, 49 U. S. C. A., Section 13, par. (1), entitled "COMPLAINT TO * * * AND INVESTIGATION BY COMMISSION", commences

"Any person, firm, etc. * * * ",

and the last sentence reads:

> "If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

This Act, unlike the Federal Trade Commission Act *but like* the National Labor Relations Act, creates rights and remedies that do not exist in any other jurisdictional tribunal and which would not exist but for this Act.

The Courts have held that the Interstate Commerce Commission, the tribunal set up to protect and enforce the rights and remedies created by the Interstate Commerce Act, must take jurisdiction and must prosecute a violation where their investigation indicates the violation exists.

Mitchell v. *U. S. of America,* 313 U. S. 90.

As is indicated by the two cases cited, the Circuit Court of Appeals was moved by the consideration that The Board was an administrative tribunal with wide discretion and that it was to administer the National Labor Relations Act as it thought best for the public. It is respectfully submitted that this is flying in the face of the very Act itself. The Act creates rights which do not exist anywhere else in law. These rights are vested in persons. These persons should have the right to enforce those rights, whether the person be a single employee working in a sweat shop or whether that person be the tremendous union of employees employed by a gigantic corporation. If The Board's contention were upheld or the decision of the Circuit Court were upheld The Board

could completely disregard "the little" fellow on the ground that some of the causes involving more people required prior attention, and there was no time left to treat of the complaints of the "little fellow".

The refusal to issue a complaint is a final order.

The Justices of the Circuit Court of Appeals were not impressed with The Board's argument that the refusal to take jurisdiction was not a final order. In the argument they dismissed such a contention, nor is it even mentioned in the decision of the Court. Obviously such a refusal terminates the proceeding itself, operates to divest the rights granted by the National Labor Relations Act and completely disposes of the subject matter and rights of the parties. It is not interlocutory but a definitive determination.

POINT III

The case is one of first impression.

The present proceeding is the first under Section 10-f (29 U. S. C. A., Sec. 160-f) to be brought before this Court, and for that reason alone deserves the consideration of this Court.

We respectfully urge that the decision in the Court below was erroneous in that it fails to give effect to the intent of Congress in administering the rights granted to petitioner as an aggrieved person under the National Labor Relations Act.

POINT IV

The complaint in the instant case was filed with The Board before the expiration of 90 days after the signing of the agreement of which petitioner complains between management and labor.

This is not a situation where petitioner should be precluded from relief, because the agreement complained of was in existence more than ninety (90) days before charges of unfair labor practice was filed with The Board. The record discloses that petitioner filed the charges of unfair labor practice, which is the basis of this proceeding, within a few hours after the alleged improper agreement was signed.

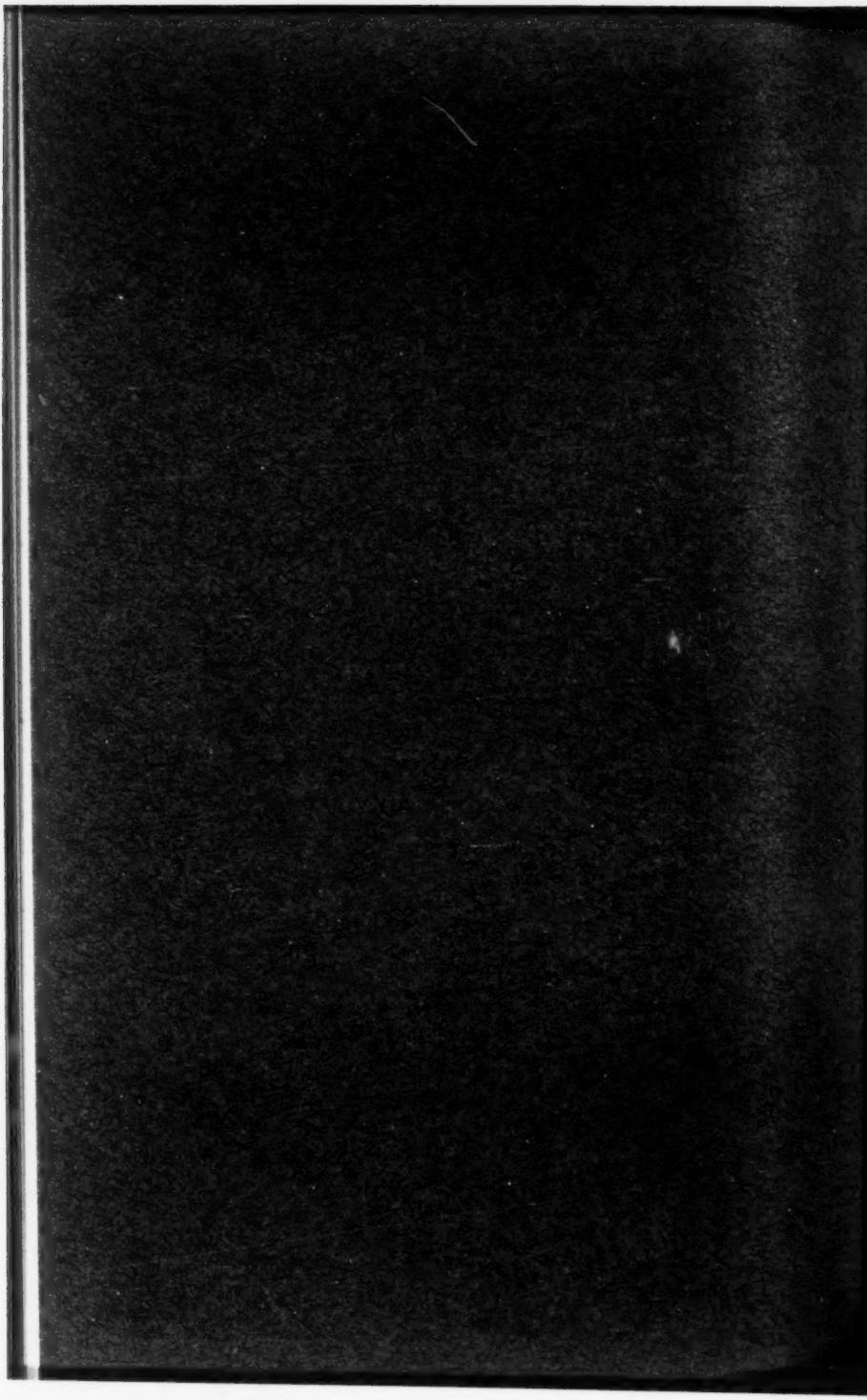
Furthermore the agreement between the management and employee (and it was with a single employee) was neither negotiated or signed in good faith, but for the very purpose of thwarting the National Labor Relations Act.

CONCLUSION

We respectfully pray that the petition for certiorari be granted.

Respectfully submitted,

ARTHUR F. DRISCOLL,
Solicitor for Petitioner.



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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 357

MARINE ENGINEERS' BENEFICIAL ASSOCIATION, LOCAL NO. 33, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The circuit court of appeals filed no formal opinion. The notation by the court of the authorities it relied upon in dismissing the petition filed by the petitioner in the court below appears in the record at page 45. The action of the Board which petitioner challenges is unreported.

JURISDICTION

The order of the circuit court of appeals (R. 51-52) was entered on June 15, 1943. The peti-

tion for a writ of certiorari was filed on September 15, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether a circuit court of appeals is empowered by Section 10 (f) of the National Labor Relations Act to review a determination of the Board refusing to issue a complaint.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in the Appendix, *infra,* pp. 13–17.

STATEMENT

Petitioner, a labor union, filed with the Board a charge of unfair labor practices by an employer (R. 5, 34). The Board issued its complaint based upon petitioner's charge but thereafter withdrew it and refused again to issue a complaint in the matter (R. 8–9, 34). Petitioner thereupon petitioned the Circuit Court of Appeals for the Second Circuit for review of the Board's action in withdrawing its complaint and its refusal to issue a complaint thereafter (R. 1–14). Upon motion by the Board (R. 33–45), the petition was dismissed (R. 45, 51–52).

ARGUMENT

1. The Act, as well as the uniform decisions of this Court and the circuit courts of appeals, make it clear that the power of the Board to issue or to decline to issue a complaint and to withdraw a complaint prior to the holding of a hearing thereon is not subject to judicial supervision. Thus the Act by Section 10 (a) provides:

> The Board is *empowered* * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce. [Emphasis supplied.]

By Section 10 (b):

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have *power* to issue * * * a complaint. [Emphasis supplied.]

Similarly, Section 10 (c) gives the Board "power" to petition any circuit court of appeals for enforcement of its order. Conversely, the statute is quite specific where it imposes an affirmative duty upon the Board. By Section 10 (c) it is provided that testimony taken at a hearing "*shall be* reduced to writing," and if the Board thereafter concludes that an unfair labor practice has been committed:

> * * * then the Board *shall* state its findings of fact and *shall issue* and cause to be served * * * an order * * *

> to cease and desist * * * and to take * * * affirmative action. [Emphasis supplied.]

Similarly, if the Board concludes that no person named in the complaint has engaged in unfair labor practices:

> * * * then the Board *shall* state its findings of fact and *shall* issue an order dismissing the said complaint. [Emphasis supplied.]

The mere grant of power to the Board to act with respect to prevention of an unfair labor practice is not tantamount to the imposition of a duty upon the Board so to act. The grant of power contemplates use of a proper discretion with respect to its employment, and in appropriate cases envisages its nonuse despite the ostensible presence of unfair labor practices. The statute is express in its imposition of duties in other matters; where issuance of complaint is concerned, it does no more than affirm the Board's "power" to do so. This is conclusive against petitioner's contention. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18; *National Labor Relations Board* v. *Barrett Co.*, 120 F. (2d) 583, 586 (C. C. A. 7).

Petitioner seeks, in effect, to have the courts assume the function of determining in which cases the Board shall initiate or prosecute proceedings. Congress, however, pursuant to its

policy of establishing "division of responsibility" and coordination of functions between the courts and the administrative agencies [1] has, by the provisions of Section 10 (a) and (b), entrusted this purely administrative matter, involving "control [of] the range of investigation," solely to the discretion of the Board.[2] *Federal Communications Comm.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142–143.

The Act makes no provision either for the duplication or the supervision of this function by the courts.[3] Such a function, by its very nature,

[1] *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208.

[2] Accordingly, Circuit Courts of Appeals in addition to that of the Second Circuit have uniformly dismissed petitions seeking review of instances of the Board's determination not to issue complaint. *Progressive Mine Workers of America, International Union, affiliated with the A. F. of L.* v. *National Labor Relations Board* (without opinion), 3 Labor Cases Par. 60,133 (App. D. C.); *White* v. *National Labor Relations Board* (without opinion), 9 L. R. R. 506 (App. D. C.); *Anderson* v. *National Labor Relations Board* (without opinion), decided December 8, 1942 (C. C. A. 7). And see *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18; *Jacobsen* v. *National Labor Relations Board*, 120 F. (2d) 96, 100 (C. C. A. 3); *National Labor Relations Board* v. *Barrett Co.*, 120 F. (2d) 583, 586 (C. C. A. 7).

[3] It is noteworthy that paragraphs (e) and (f) of Section 10, insofar as they treat of the reviewing court's decree, authorize only such decree as shall *enforce*, *modify*, or *set aside* the Board's order. They make no provision for a decree of the kind here sought, directing the Board to issue a complaint, hold a hearing thereon, or take any other administrative step leading to issuance of a final order.

is peculiarly within the field which Congress has committed to the Board and similar agencies. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18.[4] Success or failure in preventing unfair labor practices may depend upon the careful selection, from among hundreds of cases in which action is sought, of those in which proceedings are to be undertaken. Such selection depends upon many factors: e. g., the relative importance of cases, the significance of particular cases or issues, the state of the agency's docket, or its available facilities. Such factors obviously call for final determination by the specialized agency which Congress has made primarily responsible for the Act's enforcement. Such factors are in their nature not reducible to a record, and the Act provides for no record of the proceedings upon which this administrative step is based. In sum, "the course to be pursued rests in the sound discretion of the Board and is the concern of expert admin-

[4] The function and responsibility of the Board, in this respect, are in no way unique in the procedures adopted for the enforcement of public statutes. Thus, a district attorney or other prosecuting official has an unreviewable power to determine whether the facts concerning an alleged violation of law warrant the initiation of a prosecutiton or its continuation, even though his action may have an adverse effect upon a party standing to benefit from the outcome of the proceedings. This is true even in proceedings under a statute conferring benefits upon an informant upon the successful conclusion of the proceedings. *Confiscation Cases*, 74 U. S. 454, 458–459, 463.

istrative policy." *Jacobsen* v. *National Labor Relations Board, supra,* 120 F. (2d) 96, 100 (C. C. A. 3).

To impose upon the courts the duty of supervising these administrative steps would be to subject them to a tremendous burden of litigation,[5] in a field foreign to the "range of their staple business,"[6] and involving matters not of record. Moreover, under petitioner's theory, the determination of such questions of policy would rest ultimately, not with a single administrative agency, but with 11 courts of appeals, forced to proceed upon the prompting of hundreds of private litigants. Such an arrangement would render practically impossible the effective enforcement of the statute on a nation-wide scale. This very fact, as the legislative history shows, was a controlling consideration which led Congress to establish a single Board responsible for the Act's administration. The Senate Committee on Education and Labor, in recommending the provision of the Act creating the Board, pointed out the defects in administration of Section 7 (a) of the National Industrial Recovery Act resulting from division of authority among "a wide variety of

[5] During the fiscal year 1941–42, 755 unfair labor practice cases were, like the instant case, closed by the action of Regional Directors declining to issue a complainant. Seventh Annual Report of the National Labor Relations Board, p. 26.

[6] The *Pottsville* case, 309 U. S. at 142.

independent industrial boards," and stressed the need "to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining."[7]

Petitioner contends that the Act accords rights to it pursuant to which it may compel issuance of a complaint by the Board. However, it is clear that the statute creates no private right of action and that the Board acts purely in the public interest with full discretion to prosecute an appropriate proceeding in violation thereof, or to refuse to do so, or to abandon such a proceeding once begun. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261; cf. *Federal Trade Comm.* v. *Klesner*, 280 U. S. 19, 25. Petitioner's contention that the Board does not have discretion to forbear proceeding upon charges filed, similar to the discretion admittedly accorded under the Federal Trade Commission Act, but that it is under an unqualified duty to proceed under a duty analogous to that which the Interstate Commerce Act imposes, was previously disposed of by this Court in the *Consolidated Edison* case, *supra*, pp. 268–269. There, this Court explicitly declared that the procedure

[7] S. Rept. No. 573, 74th Cong., 1st Sess., pp. 4–5, 15. Cf. *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 559–562.

and concomitant rights and duties under the instant statute are analogous to those under the Federal Trade Commission Act, whereas the rights and duties flowing from the Interstate Commerce Act, which were not "drawn in analogy to the Federal Trade Commission Act," are "wholly dissimilar."

2. Petitioner's second contention (Pet. 8, 12–14), that the Board's refusal to issue a complaint is a final order and, as such, reviewable at the instance of a private organization under Section 10 (f), is, we submit, without merit.

We have already noted (*supra,* p. 3) that by Section 10 (b) the Board has "power" to issue a complaint and that this power is not mandatory but discretionary. Issuance of a complaint is not conditional upon any formal requirement such as prior notice, hearing or finding of facts, no record is required to be made showing the basis of the issuance or nonissuance of a complaint, and the Board's action with respect thereto is nowhere characterized as an "order." It is only after a due and formal hearing after answer filed, with the testimony reduced to writing, that the Board, concluding that unfair labor practices have occurred, "shall state its findings of fact and shall issue * * * *an order*" appropriate to the situation. If the Board concludes that no unfair labor practices have occurred, it "shall state its findings of fact and issue *an order* dismissing the

said complaint" (paragraph (b), (c)). [Emphasis supplied.] [8]

Having thus provided for the issuance of "an order" upon the basis of a complaint, answer, testimony, and findings, and having used the term in no other sense, the section then authorizes the Board to petition an appropriate court for the enforcement of *"such order"* (paragraph (e)), and provides that a "person aggrieved by *a final order of the Board* granting or denying * * * the relief sought" may obtain a review thereof (paragraph (f)). [Emphasis supplied.] Both paragraphs further make clear the type of order to which they refer by requiring, as a prerequisite to the court's jurisdiction, the filing of a transcript of the record "including the pleadings and testimony upon which" the order "was entered and the findings and order of the Board." See *Matter of Petition of National Labor Relations Board,* 304 U. S. 486. Finally, the provision of both paragraphs (e) and (f) that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive" affords further confirmation that these review provisions apply only to orders based on findings of fact.

The manner in which the term "order" is employed in the statute makes it clear that only a

[8] Paragraph (d), empowering the Board to modify or set aside "any finding or order," can refer only to orders issued under paragraph (c) after a hearing, since the amendment of complaints is elsewhere separately provided for (Section 10 (b)).

formal conclusion, as a judicial act, based upon a full record, is being referred to, and not an initial informal administrative decision whether or not to proceed upon a charge by issuance of complaint. Compare *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 406–409; *Federal Power Comm.* v. *Metropolitan Edison Co.*, 304 U. S. 375, 384, 387. The two determinations are not alike. *National Labor Relations Board* v. *Barrett Co.*, 120 F. (2d) 583, 586 (C. C. A. 7). The statutory intent is all the more unmistakable from the practical consideration that the judicial review for which the Act provides, based on a record including testimony and findings, would be impossible of application to such an administrative determination by the Board, a determination based on no hearing, testimony or findings, nor upon any proceedings which the statute makes a matter of record.[9] The petition herein contains no indication as to what record is the basis of the review sought; the Act provides for no such record.

3. We do not agree with petitioner's third contention (Pet. 8, 14) that the case is one of first impression and the first to be brought before this Court under Section 10 (f).

This Court has made it sufficiently plain in previous decisions that the Board may, in its

[9] As hereinbefore noted, the considerations upon which such a determination is made are, by their nature, not reducible to a record.

sound discretion, refuse to proceed in enforcement of the public rights created by the statute; further pronouncement on this Court's part is unnecessary. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261; cf. *Federal Trade Comm.* v. *Klesner*, 280 U. S. 19.

The appropriate law is well understood and has been uniformly applied by Circuit Courts of Appeals in accordance with the rulings of this Court.

The case presents no question which this Court has not previously determined. The petition should, therefore, be denied.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

ROBERT B. WATTS,
General Counsel,
RUTH WEYAND,
WILLIAM J. AVRUTIS,
Attorneys,
National Labor Relations Board.

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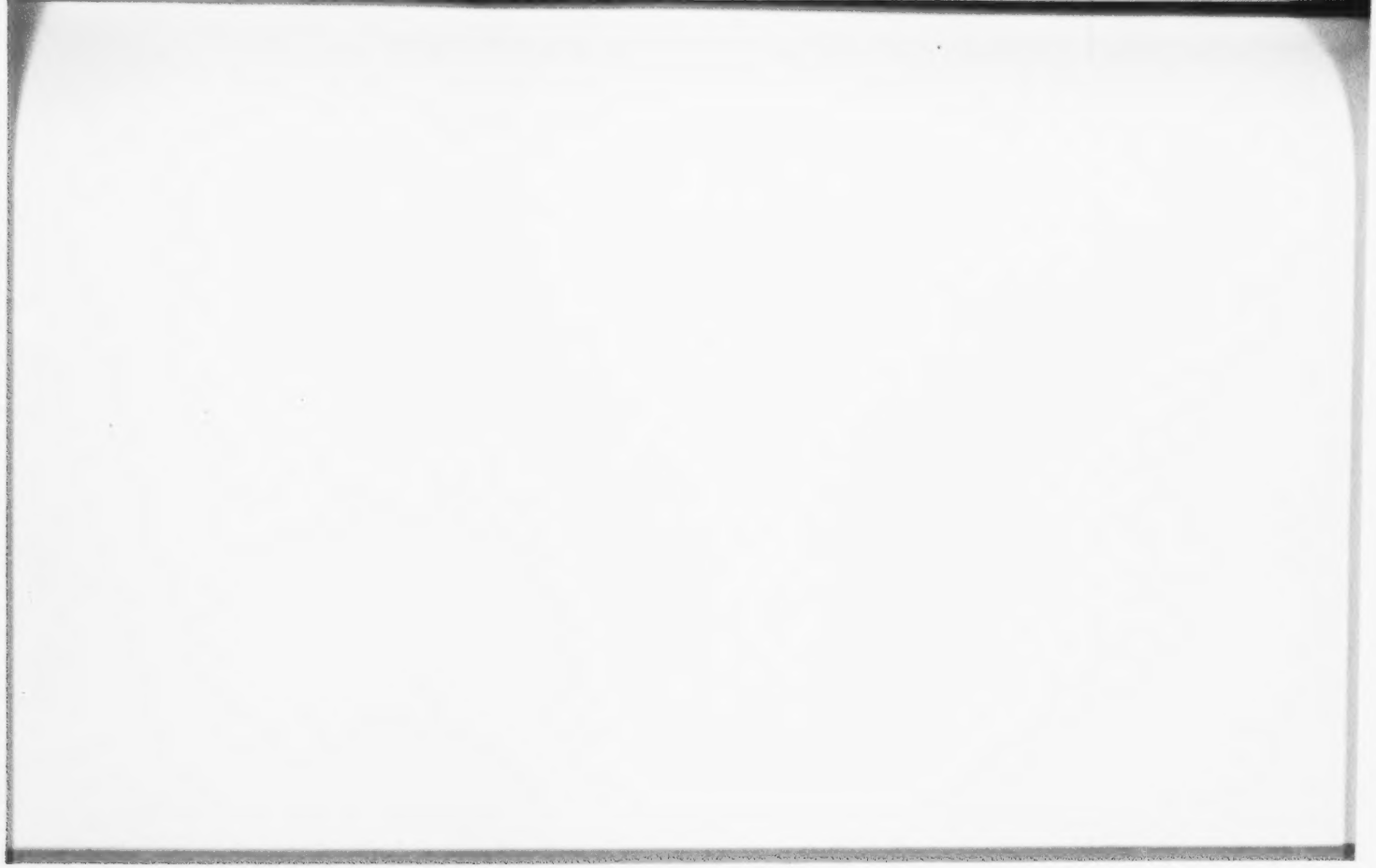

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

> SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.
>
> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended com-

plaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as

hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the

failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in

the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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